

STATE OF NORTH CAROLINA  
COUNTY OF HALIFAX

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
08-CVS-922

MILTON JAMES GARRETT, on Behalf of  
Himself and the CITY OF ROANOKE  
RAPIDS and its TAXPAYERS

Plaintiff,

v.

RANDLE "RANDY" H. PARTON;  
RICHARD "RICK" WATSON;  
MOONLIGHT BANDIT PRODUCTIONS,  
LLC; MOONLIGHT BANDIT  
PROPERTIES, LLC; FRIENDS OF  
MOONLIGHT BANDITS, LLC;  
MOONLIGHT BANDIT CONCESSIONS,  
LLC; MOONLIGHT BANDIT  
MERCHANDISING, LLC;  
NORTHEASTERN NORTH CAROLINA  
REGIONAL ECONOMIC DEVELOPMENT  
COMMISSION; AND NORTH CAROLINA'S  
NORTHEAST PARTNERSHIP;

Defendants.

**DEFENDANT RICHARD "RICK" G.  
WATSON'S MOTION TO DISMISS  
AMENDED COMPLAINT**

Defendant Richard "Rick" G. Watson, through his attorneys Bailey & Dixon, L.L.P. and Harris, Winfield, Sarratt & Hodges, LLP, hereby moves the Court, pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss Plaintiff's Amended Complaint. The basis for this Motion is set forth in the Memorandum filed by Defendant Watson contemporaneously with this Motion.

WHEREFORE, Defendant Watson respectfully requests that the Court dismiss Plaintiff's Amended Complaint with prejudice.

This the 6th day of October, 2008.

**BAILEY & DIXON, L.L.P.**

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CERTIFICATE OF SERVICE

The undersigned attorney for Defendant Watson hereby certifies that on this day the foregoing Motion to Dismiss was served upon the attorneys of record for the parties in this action by depositing a copy thereof in the United States mail, postage prepaid and addressed as follows:

Jeanette K. Doran NC Institute for Constitutional Law 333 E. Six Forks Road, Suite 180 Raleigh, North Carolina 27609 <i>Attorneys for Plaintiff</i>	Mark A. Finkelstein Smith Moore LLP 2800 Two Hannover Square Raleigh, North Carolina 27601 <i>Attorneys for Ernest C. Pearson</i>
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This the 6th day of October, 2008.

/s/Cathleen M. Plaut

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LLC; MOONLIGHT BANDIT  
PROPERTIES, LLC; FRIENDS OF  
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NORTHEASTERN NORTH CAROLINA  
REGIONAL ECONOMIC DEVELOPMENT  
COMMISSION; AND NORTH CAROLINA'S  
NORTHEAST PARTNERSHIP;

Defendants.

**MEMORANDUM IN SUPPORT OF  
DEFENDANT RICHARD "RICK" G.  
WATSON'S MOTION TO DISMISS  
AMENDED COMPLAINT**

Defendant Richard "Rick" G. Watson ("Watson"), by and through his attorneys Bailey & Dixon, L.L.P., submits this Memorandum in support of his Motion to Dismiss Amended Complaint pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6).

**STATEMENT OF FACTS**

Plaintiff Milton James Garrett ("Garrett" or "Plaintiff") filed this action as "a taxpayer to the governments of Roanoke Rapids, Halifax County and the State of North Carolina." *Plaintiff's Amended Complaint*, ¶3. Plaintiff seeks actual and punitive damages from Defendant Watson and others to be paid to the City of Roanoke Rapids and the State of North Carolina. *Plaintiff's*

*Amended Complaint, Prayer for Relief, p. 33.* Plaintiff alleges that his action is brought pursuant to statutory and common law “to obtain relief from certain acts of Defendants in the obtaining and the subsequent distribution of public monies” in connection with an entertainment enterprise formerly known as “The Randy Parton Theatre.” *Plaintiff’s Amended Complaint, ¶1.*

In his Complaint, Plaintiff correctly asserts that Watson obtained an equity interest in the various “Moonlight Companies.” *Plaintiff’s Amended Complaint, ¶¶54, 58.* Plaintiff also correctly asserts that the Moonlight Companies’ Annual Reports filed with the North Carolina Secretary of State on April 27, 2007 reveal that Watson was a member of the “Moonlight Companies.” *Plaintiff’s Amended Complaint, ¶58.*

In his Prayer for Relief, Plaintiff asks:

That the Court issue a declaration that all contracts entered into by or among any Defendants in furtherance of or in connection to the Theater, including the Settlement Agreement between Defendant Parton and the City of Roanoke Rapids, be declared null and void.

*Plaintiff’s Amended Complaint, p. 33.*

A copy of the Settlement Agreement and Release of All Claims (“Settlement and Release”) that Plaintiff refers to in his Amended Complaint is attached hereto as *Exhibit 1* and incorporated herein by reference. The Settlement and Release was executed by the City of Roanoke Rapids, Randy Parton and Moonlight Bandit Productions LLC (“MLB”). Paragraph 1 of the Settlement and Release states in pertinent part:

**Consideration.** In consideration of the compromise of certain disputed claims identified in Paragraph 2 herein and in further consideration of the payment by the City to Parton and MLB of the sum of \$750,000, the receipt and sufficiency of which is hereby acknowledged, and the other agreements of the parties contained herein, the parties do hereby voluntarily and knowingly execute this Release with the expressed intention of effecting the extinguishment of all claims or obligations herein designated that either party hereto has asserted or could have asserted against the other party relating to the Economic Development Agreement and all documents referenced therein (collectively, the “EDA”) executed by them on or about June 30, 2005 (as supplemented or amended);

the Performance and Management Agreement and all documents referenced therein (Collectively, the "PMA") executed by them on or about November 20, 2007; and the creation, ownership, management, promotion of and operation of the Randy Parton Theatre (now the Roanoke Rapids Theatre)(the "Theatre") in Roanoke Rapids, North Carolina, as further described herein.

Paragraph 4 of the Settlement and Release states:

**Releases.** Each party hereto does for itself and its agents, representatives, officers, managers, *members*, successors, successors in title, and assigns, hereby promises and covenants not to sue or demand arbitration and does release, acquit and forever discharge the other party and its agents, assigns, insurers, sureties, servants, employees, representatives, attorneys, *owners*, officers, managers, *members*, affiliates, predecessors and successors, and each of them, of and from any and all claims, actions or causes of action, demands, damages (both actual and punitive), costs, judgments, expenses, liabilities, attorneys' fees and legal costs, injunctive or declaratory relief, whether asserted or unasserted, whether in law or in equity, whether in tort or contract, including without limitation claims to recover damages from whatsoever cause arising or from whatsoever act or omission and claims for reimbursement or indemnity (except as hereafter specified), which each party now has or might otherwise have asserted against the other allegedly arising out of or relating to the EDA, the PMA, or the creation, ownership, management, promotion of or operation of the Theatre, whether known or presently unknown, of any type or kind whatsoever, all to the end that all claims, issues, or matters relating to the EDA, the PMA, or the creation, ownership, management, promotion of, or operation of the Theatre that are or might be in controversy between the parties may be forever put at rest, it being the parties' clear intention to forever discharge and release all of their past, present, and future claims against each other concerning or relating to the EDA, the PMA, or the creation, ownership, management, promotion of, or operation of the Theatre.

In no event shall this Release in any way release, acquit, discharge, or otherwise provide any benefit to United Group Limited, UNICCO Service Company, UGL Unicco, or to any subsidiary, parent company, affiliate, officer, director, shareholder, agent, employee, representative, predecessor, or successor thereof, with regard to any claim or cause of action that may be brought by Parton, MLB, or the City against any of them.

*(Emphasis added).*

The Settlement and Release expressly releases the members of Moonlight Bandit Productions, LLC. Watson was a Member of Moonlight Bandit Productions, LLC, and the City has released him from all claims arising out of the Economic Development Agreement, the

Performance and Management Agreement, and the creation, ownership, management, promotion of, or operation of the Randy Parton Theatre.

Plaintiff lacks standing to bring this claim against Watson for himself or on behalf of Roanoke Rapids or its taxpayers. Further, because the City released Watson from all claims, Plaintiff is constrained by the Settlement and Release and is barred from bringing this action against Watson.

### LEGAL ARGUMENT

#### 1. **Plaintiff Lacks Standing to Bring this Action Against Watson.**

There is no legal authority under the laws of North Carolina that provides Plaintiff standing to bring this action.

Standing to sue is a jurisdictional issue and does not generally concern the ultimate merits of a lawsuit. *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 140, 544 S.E.2d 821, 824 (2001). Standing is properly challenged by a motion to dismiss pursuant to either Rule 12(b)(1) for lack of subject matter jurisdiction, *Fuller v. Easley*, 145 N.C.App. 391, 395, 553 S.E.2d 43 (2001), or Rule 12(b)(6) for failure to state a claim upon which relief can be granted, *Energy Investors Fund LP v. Metric Constructors, Inc.* 351 N.C. 331, 337, 525 S.E.2d 441 (2000); and the burden is upon the party asserting standing to show that such standing exists. *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002), *rev. denied*, 356 N.C. 675, 577 S.E.2d 628 (2003).

“Generally, an individual taxpayer has no standing to bring a suit in the public interest.” *Fuller v. Easley*, 145 N.C.App. 391, 395, 553 S.E.2d 43 (2001), *citing Green v. Eure*, 27 N.C.App. 605, 608, 220 S.E.2d 102, 105 (1975), *cert. denied*, 289 N.C. 297, 222 S.E. 2d 696 (1976). There are a few specific exceptions to this general rule, none of which apply in this

instance. For example, the court in *Texfi Industries v. City of Fayetteville*, 44 N.C.App. 268, 270, 261 S.E.2d 21, 23 (1979) found that this rule “does not apply where a taxpayer shows that the tax levied upon him is for an unconstitutional, illegal, or unauthorized purpose, that the carrying out of a challenged provision will cause him to sustain personally a direct and irreparable injury, or that he is a member of the class prejudiced by the operation of a statute.” (Citations omitted).

None of these exceptions apply here. Plaintiff does not allege a tax levied upon him for an unconstitutional, illegal, or unauthorized purpose. *Blinson v. State*, \_\_\_ N.C.App. \_\_\_, 651 S.E.2d 268 (2007) put the issue of the constitutionality of government economic incentives to rest. Nor does Plaintiff allege that the carrying out of a challenged provision of any government action will cause him to sustain a personal injury, or that he is a member of a class prejudiced by the operation of a statute.

There are two other lines of authority upon which Plaintiff may attempt to rely that provide an exception to the general rule. The first is *Goldston v. State of North Carolina*, 361 N.C. 26, 637 S.E.2d 876 (2006); and the second is *Branch v. Board of Education*, 233 N.C. 623, 625, 65 S.E.2d 124, 126 (1951).

The Court in *Goldston* defined the issue as follows: “In this case, we must determine whether individual taxpayers have standing to seek relief when they allege government officials violated statutory and constitutional provisions by diverting tax levies appropriated for one purpose but disbursed for another.” *Id.* at 27-28. The Court’s conclusion was: “We reaffirm our long-standing holdings that taxpayers have standing to challenge unlawful or unconstitutional government expenditures. . .” *Id.* at 28. In the present case there is no allegation that government officials violated statutory or constitutional provisions, nor is there a challenge to

any unlawful or unconstitutional government expenditures. It is noteworthy that the defendant in the *Goldston* case is a government entity. This is a consistent thread of the “taxpayer derivative” cases that Plaintiff apparently depends upon. In every such case, the plaintiff is suing a government entity charged with unlawful conduct. In the present instance, Plaintiff purports to sue on behalf of the government entity itself, asserting tort and contract remedies which Plaintiff deems the government entity ought to have asserted but did not. There is no precedent for this legal theory.

The *Goldston* court cites a variety of precedent for the proposition that a taxpayer has a right to sue “to prevent an illegal disposition of the moneys of the county”, citing *Stratford v. City of Greensboro*, 124 N.C. 110, 114, 32 S.E. 394, 396 (1899); or to prevent a government entity from “making illegal disbursements of public funds”, *Freeman v. Board of County Commissioners*, 217 N.C. 209, 212, 7 S.E.2d 354, 357 (1940); or from “transcending their lawful powers” *Lewis v. White*, 287 N.C. 625, 644, 216 S.E.2d 134, 146 (1994) (quoting *Merrimon v. S. Paving & Constr. Co.*, 142 N.C. 427, 431 – 32, 55 S.E. 366, 367 (1906)) or “to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds” *Goldston* at 33. In summary, the *Goldston* court states “we hold only that these taxpayers . . . have standing to challenge the government expenditures as illegal or unconstitutional.” *Id.* at 35. (*Emphasis added*). The present case does not fall within this specifically restricted parameter.

The *Branch v. Board of Education* line of cases does not provide any more support for Plaintiff’s standing in this case than does the *Goldston* line of cases. In *Branch* plaintiff sued “solely in their capacity as taxpayers of Robeson County” in asserting that Robeson County and its county manager “have unlawfully diverted various school funds belonging to each of the four

school administrative units". *Id.* at 125. Citing *Branch*, the plaintiffs in *Guilford County Board of Commissioners v. Trogdon*, 478 S.E.2d 643 (N.C.App. 1996) relied on the *Branch* theory in a case brought by a successor Board of County Commissioners, as well as taxpayers suing for themselves and others similarly situated, against a predecessor Board of Education challenging the legality of the prior Board's action. Once again, the emphasis was on taxpayers suing to force a government entity to do the right thing. That is far from the thrust of the present action.

The present cause of action is unlike any other reported decision in this or, as far as undersigned counsel can tell, any other jurisdiction. Plaintiff purports to assert contract and tort remedies on behalf of the City of Roanoke Rapids. Plaintiff's claim essentially is that the Defendants jointly and severally misled the City of Roanoke Rapids into entering into the Economic Development Agreement attached to the Amended Complaint as Exhibit B. There is no assertion that the City's action in entering into that agreement was unlawful, unconstitutional, in violation of statute, or in any other way improper.

Plaintiff's claims are:

1. That the Defendants breached a fiduciary duty that they had to the City;
2. That the Defendants committed a tortuous act against the City;
3. That negligent misrepresentations were made by the Defendants to the City; and
4. That for all of the above reasons, any agreement between the Defendants and the City should be rescinded.

None of these claims fall within the ambit of any case which has ever provided any tax holder standing to sue on behalf of a government entity.

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Beyond the simple and dispositive circumstance that Plaintiff has cited no relevant authority for asserting standing, there remain two other matters apparent on the face of the Complaint which bar Plaintiff from proceeding further in this matter. The first is a Settlement Agreement reached by the City; and the second is the failure of Plaintiff to adequately demand of the City that it assert the rights which Plaintiff is now purporting to assert on its behalf.

**2. The Settlement and Release Bars Plaintiff's Claims Against Watson.**

A release given for valuable consideration is a complete defense to a claim for damages. *See, e.g., Best v. Ford Motor Co.*, 148 N.C. App. 42, 557 S.E.2d 163 (2001). A valid release of one of several joint tortfeasors releases all and is a bar to a suit against any of them for the same injury. *McNair v. Goodwin*, 262 N.C. 1, 136 S.E.2d 218 (1964).

On February 29, 2008, the City entered into the Settlement and Release referenced in Plaintiff's Prayer for Relief in the Amended Complaint and attached hereto. Every purported misdeed by any Defendant referenced in the Complaint took place prior to the date of that Settlement and Release. In the Settlement and Release, the City released Randy Parton, Moonlight Bandit Productions, LLC and its owners and members (which necessarily includes Watson) from any and all claims which the City might have against them, including any and all claims which Plaintiff now purports to assert on the City's behalf in this action.

It is clear that the parties to the Settlement and Release intended that the scope of the agreement include Watson as he is a member of Moonlight Bandit Productions, LLC. The Settlement and Release specifically reserves the parties' rights against other specific entities, so the parties manifestly considered exclusions from the general release provisions. Had the City wished to reserve its rights against Watson, it could have included him within the exclusions from the general release provisions.

Thus, whether or not the City was ever misled in any respect, on February 29, 2008 the City undertook and agreed to release all of the claims which Plaintiff purports to bring against Watson. There is no assertion in the Complaint that the City did not have the legal authority to act as it did in executing this release nor, indeed, that the City acted improperly in doing so. There is certainly no allegation that any of the Defendants misled, or unfairly or otherwise tortuously caused the City to enter into the Settlement and Release. With this in mind, Plaintiff is doing no more or less than asking the Court to substitute the judgment of the Plaintiff taxpayer for the judgment of the City of Roanoke Rapids and its City Council with respect to the claims which Plaintiff wishes the City to assert.

**3. Plaintiff Failed to Establish a Demand Made to the City of Roanoke Rapids or a Refusal to Act by the City.**

A second related issue is that under the law relied upon by Plaintiff, as articulated in *Branch*, a taxpayer or derivative Plaintiff must further establish either: (a) that there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the public agency or political subdivision; or (b) that a demand on such authorities would be useless. *Branch* 233 N.C. at 626, 65 S.E.2d at 126-27. Plaintiff has not met this requirement. Without doubt, there has not been demand and refusal to act, nor has Plaintiff properly pled that a demand on the proper authorities would be useless.

**CONCLUSION**

For the foregoing reasons, Defendant Watson's Motion to Dismiss the Amended Complaint should be allowed.

October 6, 2008.

**BAILEY & DIXON, L.L.P.**

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CERTIFICATE OF SERVICE

The undersigned attorney for Defendant Watson hereby certifies that on this day the foregoing Memorandum in Support of Motion to Dismiss was served upon the attorneys of record for the parties in this action by depositing a copy thereof in the United States mail, postage prepaid and addressed as follows:

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This the 6th day of October, 2008.

/s/Cathleen M. Plaut